No. 89-1041 (3)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF MISSISSIPPI
AND
MISSISSIPPI PUBLIC SERVICE COMMISSION,
Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS THE LOUISIANA PUBLIC SERVICE COMMISSION, STATE OF LOUISIANA, OCCIDENTAL CHEMICAL CORPORATION, AND GEORGIA GULF CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When the Federal Energy Regulatory Commission bases an antidiscrimination remedy on factual findings that all nuclear units on a highly integrated electric system were planned and constructed for and provide substantial benefits to all of the companies on the system—and the court of appeals has affirmed those findings—should this Court grant certiorari to review the evidentiary support for those factual findings?

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Respondents the Louisiana Public Service Commission ("LPSC"), the State of Louisiana, Occidental Chemical Corporation ("Occidental"), and Georgia Gulf Corporation ("Georgia Gulf") (collectively, the "Louisiana Consumers") hereby submit their Brief In Opposition to the Petition For Writ of Certiorari filed by the State of Mississippi and the Mississippi Public Service Commission ("Petitioners") in the above-named case.

This case concerns the allocation of electric generating costs among the four wholly owned operating affiliates of Entergy Corporation ("Entergy") (formerly Middle South Utilities, Inc.). The LPSC is the regulatory authority charged, by Article 4 § 21 of the Louisiana Constitution, with the duty and authority to regulate public utilities in the State of Louisiana. One of the Entergy operating companies, Louisiana Power & Light Company ("LP&L"), is subject to the LPSC's jurisdiction and serves approximately 570,000 retail customers in Louisiana. Occidental and Georgia Gulf are the two largest customers of LP&L.[1] The Louisiana Consumers were active participants in the proceedings before the Federal Energy Regulatory Commission ("FERC" or "Commission") and the court of appeals below. The Louisiana Consumers believe that the Petitioners' challenge to FERC's remedy, which was designed to protect the interests of all consumers on the Entergy system by curing an unduly discriminatory allocation of costs, does not present a substantial issue of law. Indeed, it is without basis in law and is contrary to the evidence. The Court should deny the Petition For Writ of Certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit in *City of New Orleans v. FERC* (*"City of New Orleans"*), decided May 26, 1989, is reported at 875 F.2d 903 and is included in the Appendix to the Petition at 5a-10a.[2] *City of New Orleans* affirmed two opinions of FERC, *System Energy Resources, Inc. and MSU System Resources, Inc.*, Opinion No. 292, 41

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[1] Pursuant to Rule 29.1 of the Court's Rules, a list setting forth the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Occidental and Georgia Gulf is included as an Appendix to this Brief.

[2] Appendix references ("App.") in this Brief are to the Appendix included with the Petition.

FERC (CCH) ¶ 61,238 (November 30, 1987) (App. 11a-38a), and *System Energy Resources, Inc. and MSU System Services, Inc.*, Opinion No. 292-A (opinion on rehearing), 42 FERC (CCH) ¶ 61,091 (January 29, 1988) (App. 39a-45a).

Opinion Nos. 292 and 292-A were issued on remand from the opinion of the United States Court of Appeals for the District of Columbia Circuit in *Mississippi Industries v. FERC* (*"Mississippi Industries"*)[3], which is reported at 808 F.2d 1525 and is included in the Appendix to the Petition at 46a-137a. *Mississippi Industries* addressed two FERC decisions, *Middle South Energy, Inc. and Middle South Services, Inc.*, Opinion No. 234, 31 FERC (CCH) ¶ 61,305 (June 13, 1985), and *Middle South Energy, Inc. and Middle South Services, Inc.*, Opinion No. 234-A (opinion on rehearing), 32 FERC (CCH) ¶ 61,425 (September 26, 1985). Opinion Nos. 234 and 234-A reviewed two initial decisions by FERC administrative law judges, *Middle South Energy, Inc.*, 26 FERC (CCH) ¶ 63,044 (February 3, 1984), and *Middle South Services, Inc.*, 30 FERC (CCH) ¶ 63,030 (February 4, 1985).

JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are set forth at page 3 of the Petition.

STATUTES INVOLVED

Sections 205(a) and (b) and 206(a) of the Federal Power Act, 16 U.S.C. §§ 824d(a) and (b) and 824e(a), are set forth in the Petition at 3-4. In addition, Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), provides in relevant part that:

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[3] *Vacated and remanded in part*, 822 F.2d 1104 (D.C. Cir.), *cert. denied on jurisdictional issue sub nom. Arkansas Public Service Comm'n v. FERC*, 484 U.S. 985 (1987).

The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.

STATEMENT OF THE CASE

Entergy Corporation is a registered public utility holding company under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 *et seq.* (1982). The Entergy operating affiliates—LP&L, Arkansas Power & Light Company ("AP&L"), Mississippi Power & Light Company ("MP&L"), and New Orleans Public Service Inc. ("NOPSI")—sell electric power at both retail and wholesale to customers in a four-state region (Arkansas, Louisiana, Mississippi, and Missouri). These companies operate as a highly integrated, fully coordinated electric system, interconnected by a transmission network that delivers power produced by the System's generating units to each of the operating companies. All of the generating units are controlled by the system through a central dispatch office located in Pine Bluff, Arkansas, and their output is distributed in a manner designed to minimize the costs to each company on the System.

The Commission found in Opinion Nos. 234 and 234-A, and the *Mississippi Industries* court affirmed, that the Entergy operating affiliates have for more than 30 years planned, constructed, and operated *all* major generating units on the System on the basis of what is most advantageous and economical for the System as a whole. 31 FERC at 61,645-6; App. 107a-109a. Each operating company provides input into the system planning process, which takes into account each company's native load demands. However, the critical decisions involving the construction of *all* new generating units—including the determination of which operating company will undertake construction, when it will do so, and what type of fuel will be used—are System decisions, made with reference to the benefits yielded for the System overall. App. 107a-108a. The Commission's conclusion, affirmed by the court

of appeals, that the operating companies function as a highly integrated system was based on a massive evidentiary record compiled during lengthy administrative hearings.[4] This conclusion echoed prior agency and judicial decisions which consistently recognized the integrated nature of the Entergy system. *See Arkansas Power & Light Co.*, 8 FPC 106, 107 (1949); *Arkansas Power & Light Co.*, 34 FPC 747, 752-53, *reh'g denied*, 34 FPC 1242 (1965), *aff'd*, *Arkansas Power & Light Co. v. FPC*, 368 F.2d 376, 378-79 (8th Cir. 1966) (describing the System as a "highly integrated, interconnected pool operation").[5]

The Commission also found, and the *Mississippi Industries* court affirmed, that the Entergy system has historically sought to achieve a rough equalization of the System's total generation costs[6] among the four operating affiliates. 31 FERC at 61,635; App. 51a-54a; 105a-106a. This sharing of costs has been governed by a System

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[4] Hearings before Administrative Law Judge ("ALJ") Liebman in Docket No. ER82-616-000 were held from March 14 through May 12, 1983; 159 exhibits were introduced in the proceeding and the transcript was 2,917 pages. Hearings before ALJ Head in Docket No. ER82-616-000 began on September 29, 1983, and ended on December 15, 1983. The record in that case consisted of 7,072 transcript pages and 478 exhibits.

[5] *See also In re Electric Power & Light Corp.*, 29 SEC 52, 63 (1949), wherein the Securities and Exchange Commission stated that "the electric properties of the four [Entergy] operating companies are interconnected and that since 1930 they have been constructed and operated on a systemwide basis. . . . [T]he determination of sites and ownership of generating facilities has been on the basis of the most economical and efficient installation from the viewpoint of the system's load requirements rather than the requirements of the individual companies."

[6] Generation costs consist of the fixed and variable costs associated with power production—generally referred to, respectively, as "capacity costs" and "energy costs." "Capacity" is a measure of the amount of electricity that can be produced at a given point in time; "energy" is the amount of electricity produced over a given period of time.

Agreement which has been modified from time to time to reflect changes within the System. There have been three System Agreements in effect since 1951, each of which was filed with FERC and reviewed for conformity with the requirements of Sections 205 and 206 of the Federal Power Act ("FPA"), 16 U.S.C. §§ 824d and 824e. While each Agreement has employed a somewhat different mechanism to assure a fair sharing of generation costs, the goal of each Agreement has been the same. App. 53a. The System Agreements and the coordinated planning for System generation needs were intended to achieve an equitable allocation of the costs and benefits of System operations. As set forth in Section 3.01 of the current System Agreement, one of its principal purposes is to provide a "basis for equalizing among the Companies any imbalance of cost associated with the construction, ownership and operation of such facilities as are used for the mutual benefit of all the Companies," including all the generating units on the System. App. 50a.

In the early 1970's, the System planned for and initiated construction of two new nuclear plants, Waterford Unit No. 3 ("Waterford 3") and Grand Gulf Unit No. 1 ("Grand Gulf").[7] These two units turned out to be extraordinarily expensive[8] and totally disrupted the historical balance of costs within the Entergy system. Construction of Waterford 3 was assigned to LP&L, which proceeded to finance and build the plant. Construction of Grand Gulf was originally assigned to MP&L. However, in 1974, when MP&L proved unable to finance construction of that unit, Entergy formed a new subsidiary, Middle South Energy, Inc. (now named System Energy Re-

[7] A second nuclear unit planned for Grand Gulf was cancelled in 1989 and is not at issue in this case.

[8] The combined cost of these plants was over $6 billion, more than double the total investment cost of all other generating units on the System. Yet, these two units produce only 13% of the System's electricity. App. 56a.

sources, Inc. ("SERI")), to finance and construct Grand Gulf.

In 1982, Entergy filed two interrelated agreements with FERC—a new System Agreement, which substantially modified the existing generation cost-sharing provisions, and the Grand Gulf Unit Power Sales Agreement ("UPSA"). The UPSA contained a pricing mechanism for the sale of Grand Gulf power to the operating companies, as well as an allocation of generation entitlements and cost responsibilities for that unit. Because of the unanticipated investment cost of Waterford 3 and Grand Gulf, the combined effect of the 1982 System Agreement and the UPSA as filed would have imposed vastly disparate investment cost responsibilities on the operating companies. LP&L ratepayers, for example, would have been required to pay the return of and on capital for 100% of the $2.8 billion investment cost of Waterford 3 and over 38% of the $3.3 billion investment in Grand Gulf, or almost 70% of the total investment costs of those units. AP&L, by contrast, would have assumed no cost responsibility for either unit.

In Opinion Nos. 234 and 234-A, the Commission affirmed its jurisdiction to determine "the appropriate allocation of costs among integrated companies owned by the same parent" as part of its statutory obligation to insure that interstate wholesale rates are reasonable and nondiscriminatory. 31 FERC at 61,643. As to the merits, FERC held that the proposed cost allocation embodied in the UPSA and the 1982 System Agreement was unduly discriminatory in light of its findings concerning System integration and the historic pattern of equitably sharing generation costs. To remedy the unlawful effects of these agreements, FERC modified each affiliate's cost responsibility for Grand Gulf under the UPSA in order to achieve a fair distribution of System generation costs. This remedy adopted an allocation of Grand Gulf originally prescribed by ALJ Liebman, which allocated Grand Gulf to

equalize each operating company's nuclear investment cost responsibility—requiring each company to share the System's nuclear investment costs in proportion to its average electric demand.

FERC's allocation was derived from its fundamental factual finding that *all* of the System's nuclear units, not just Grand Gulf, were planned and constructed on a systemwide basis. The Commission thus rejected the remedy proposed by ALJ Head, which would have allocated the costs of Grand Gulf in isolation from other System generating units, spreading its cost without reference to the generating costs for which the companies were already responsible.[9] FERC found that the record evidence contradicted ALJ Head's conclusion that Grand Gulf was an "anomaly" in the System pattern of integrated generation planning and construction. FERC held instead that the record clearly demonstrated that "all generation additions, including Grand Gulf, have been planned in basically the same manner." 31 FERC at 61,651. FERC explained that its allocation was consistent with the System's traditional cost-sharing practices because it would "equalize the imbalance of costs resulting from nuclear units planned and constructed by and for the System as a whole." *Id.* at 61,656-57.

The *Mississippi Industries* court affirmed: (1) FERC's jurisdictional determination; (2) its finding of System integration[10]; (3) its conclusion that the System Agree-

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[9] Petitioners did not advocate this "Grand Gulf-only" allocation approach before the Commission; in fact, they attacked ALJ Head's remedy in their exceptions to the Commission. *See* 31 FERC at 61,638.

[10] The court held that this finding was "more than adequately supported in the record" (App. 107a) and firmly supported by substantial evidence (App. 115a). Because of the critical importance of this issue, the court reviewed the record evidence establishing the fact of System integration in detail (*see* App. 107a-110a), although no party, including Petitioners, had challenged FERC's factual

ment and UPSA as filed were unduly discriminatory; and (4) its rejection of ALJ Head's methodology and the underlying conclusion that Grand Gulf was an "anomaly." App. 108a-109a. The *Mississippi Industries* panel also initially upheld FERC's remedy, but subsequently the court granted rehearing *en banc* to consider certain issues raised in Judge Bork's dissent. Thereafter, the *en banc* court vacated its rehearing order, and the panel granted rehearing and partially vacated its opinion. It remanded the case to FERC for the limited purpose of addressing the dissent's concerns regarding the adequacy of the agency's explanation of the criteria used to define "undue discrimination" and the reasons why its allocation was rational and nondiscriminatory. *Mississippi Industries v. FERC*, 822 F.2d 1104, 1105 (D.C. Cir. 1987).

Judge Bork's dissent did not question the panel's affirmance of the FERC findings concerning the integrated nature of the Entergy system and the invalidity of ALJ Head's allocation. Indeed, the dissenting opinion accepted the underlying factual premise that "the [Entergy operating] companies are not autonomous and that decisions are made for the System as a whole." App. 136a.[11] Thus, these findings were not vacated on rehearing, and they stood as the law of the case when the matter returned to FERC for its further consideration.

On remand, the Commission reaffirmed its Grand Gulf allocation, emphasizing that its remedy was consistent with the well-estab'ished ratemaking principle that "those who are responsible for the incurrence of costs be the

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findings on the ground that they were not based upon substantial evidence.

[11] Prior to the court's remand order, the Louisiana Consumers had filed motions requesting the *en banc* court to clarify that the court's rehearing order did not invite reconsideration of ALJ Head's methodology. The court granted these motions and directed parties to brief "only those issues addressed in the dissenting opinion [of Judge Bork] of January 6, 1987." *Mississippi Industries v. FERC, En Banc* Order issued May 19, 1987.

ones who bear those cost burdens." App. 20a. FERC cited to the substantial case law precedent supporting the allocation of investment costs on the basis of proportionate demand responsibility (App. 19a-20a), and explained why its decision to equalize nuclear investment costs restored the historical System pattern of rough equalization of overall generation costs.

FERC also addressed and rejected arguments raised by Petitioners which advocated ALJ Head's proposed "Grand Gulf-only" allocation. While the Commission properly noted that consideration of ALJ Head's methodology was not within the scope of the court's remand, it nevertheless reconsidered the issue and determined again that this allocation was inconsistent with the fundamental reality of System integration. FERC again reviewed the extensive record evidence refuting Petitioners' claim that direct capacity or energy entitlements are the only benefits which an operating company receives from System generating units. It pointed out that *all* generating units—not just Grand Gulf—benefit each operating company by meeting System demand, achieving economies of scale, promoting operating efficiencies, increasing System reliability and fuel diversity, and reducing reserve requirements. App. 35a.

Indeed, as the court of appeals emphasized, an operating company's direct entitlement to nuclear energy reduces its need to utilize energy from other low-cost generating units. The energy from these units, in turn, becomes available to the other operating companies, which can use such energy in lieu of energy from higher-cost generating units.[12] App. 9a. Moreover, the notion that

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[12] For example, AP&L owns virtually all the coal capacity on the System, and much of the energy from these units is available to the other operating companies because AP&L relies first on the nuclear units located in Arkansas and its share of Grand Gulf. Similarly, the existence of Waterford 3 frees up inexpensive gas-fired energy generated by LP&L for use by the other operating companies.

only a direct entitlement to energy can confer benefits is belied by the reserve equalization provisions of the System Agreement itself (which Petitioners do not challenge), which require operating companies with less than the System-average capacity reserves to pay operating companies with greater than System-average capacity reserves, even though the purchasing company does not thereby obtain corresponding energy entitlements. App. 45a.[13] Thus, MP&L *receives* payments for uneconomical oil and gas capacity that is rarely used, and the other operating companies that make the payments to MP&L have no entitlement to energy from those units.

In *City of New Orleans*, the court held that Opinion Nos. 292 and 292-A had fully and adequately dealt with the issues raised in the *Mississippi Industries* dissent. The court noted that the agency's nuclear cost equalization remedy yielded a nondiscriminatory result because of the substantial benefits provided to all of the operating companies by all of the nuclear units. It also pointedly observed that Mississippi (and its co-petitioner) had failed to offer an alternative remedy other than "to return to a method [ALJ Head's allocation] that FERC rejected with our approval [in *Mississippi Industries*]." App. 9a-10a.

REASONS FOR DENYING THE WRIT

The Petition offers no justification for this Court's review of the decision below. An analysis of the alleged "important questions" raised by Petitioners shows they are issues of fact, not law. The Court is not being asked to correct an error or misconstruction of applicable law. Rather, Petitioners challenge the agency's application of settled legal principles in a highly fact-specific context.

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[13] Similarly, the 1951 System Agreement did not provide for direct capacity or energy entitlements as part of its equitable cost-sharing mechanism. Clearly, then, such a direct entitlement cannot be the only cognizable benefit of System integration.

Equally important, Petitioners' challenge rests on an allegation of fact which is unsupported by the record and contrary to the findings of the agency. Petitioners, in effect, would have this Court undertake the wholly inappropriate task of re-evaluating evidence and second-guessing findings of fact which have been twice considered by FERC and twice affirmed by the court below. Accordingly, the Petition should be denied.

I. THIS CASE PRESENTS NO QUESTION OF LAW REGARDING THE ANTIDISCRIMINATION PROVISIONS OF THE FEDERAL POWER ACT.

The Petitioners argue that FERC's allocation establishes an "intra-system discriminatory scheme" which produces an "interstate subsidy" of certain operating companies at the expense of others. Petition at 17, 15. Their quarrel, however, does not concern the proper definition of undue discrimination or any conflict in interpreting that standard under the FPA. Rather, Petitioners complain about the particular allocation *result* that flowed directly from the agency's factual conclusions. Thus, despite the implication of the questions posited by Petitioners, FERC did not conclude that inter-customer "subsidization" is permissible under the FPA, nor did it ignore the need to consider benefits in allocating related costs. FERC correctly identified and relied on applicable case law defining the meaning of undue discrimination. App. 17a-20a. Contrary to Petitioners' claim, there is no "absence of controlling precedent" regarding the FPA's antidiscrimination standards which merits review. Indeed, a large body of case law addresses the allocation of costs within interstate electric systems, some of which is cited in Opinion No. 292. App. 19a-20a.

Based on well-settled principles, FERC fashioned a remedy which, in its judgment, would *eliminate* unlawful subsidization among the highly integrated Entergy operating affiliates. It evaluated a complex record before

concluding that nuclear investment cost equalization would, in the specific historical and operating circumstances of the Entergy system, remove unlawful rate disparities among the operating companies. The Commission thus fully satisfied its ratemaking responsibilities as identified by Justice Scalia in *Mississippi Power & Light Co. v. Mississippi*, 108 S. Ct. 2428, 2445 (1988) (*"Mississippi Power & Light"*).

The Petition's "subsidization" argument and its advocacy of ALJ Head's allocation are no more than an attack on FERC's key factual finding, affirmed by the court below, that the Entergy operating companies are highly integrated and interdependent entities that receive benefits from all of the System's nuclear plants. Petitioners concede that FERC found Entergy to be a "highly integrated and coordinated power pool" and that "construction and operation of its four nuclear power plants (including Grand Gulf I) are primarily for the benefit of the system as a whole." Petition at 6. Yet, practically in the same breath, they assert that Grand Gulf "is the only nuclear power unit in the MSU [Entergy] system that benefits or contributes to the needs of all four operating companies." *Id.* at 7.

Petitioners' argument, stripped to its essence, is that FERC's remedy is discriminatory because it "ignores the fact that not all operating companies share in the benefits of all the nuclear plants." Petition at 17. FERC, however, found that this assertion is *not* a fact; it determined that all of the Entergy companies *do* obtain important benefits from nuclear units other than Grand Gulf. Petitioners thus ask this Court to review agency fact-finding, although they did not challenge the findings on System integration in the court of appeals and provide no evidentiary basis for their conclusory assertion that the operating companies do not equitably share the benefits of the System's nuclear units.

Mississippi Industries' holding that FERC's factual findings were based on substantial evidence should be regarded, as the *City of New Orleans* court implicitly concluded, as the firmly established law of the case. Section 313(b) of the FPA, 16 U.S.C. § 825*l*(b), provides that "the finding of the Commission as to the facts, if supported by substantial evidence, *shall be conclusive*" (emphasis added). Petitioners have not met their heavy burden of demonstrating exceptional circumstances, such as clear error, that might justify reconsideration of the *Mississippi Industries* determination. *See, e.g., Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981), *cert. denied*, 459 U.S. 828 (1982); *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1082-83, 1102-03 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1181 (1985). Moreover, it is not this Court's task to review a record to decide whether an agency's decision is supported by substantial evidence. *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 309-310 (1974). This is clearly not a case where misapprehension of the substantial evidence standard by the court below warrants this Court's corrective intervention. *Id.* at 310; *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

Moreover, contrary to Petitioners' claims, FERC's decisions in this case do not "set[] a national pattern for allocating the high and often excessive costs of nuclear energy." Petition at 19. The Commission's allocation is a remedy carefully tailored to address the specific, unique characteristics of the Entergy system. It cannot readily be applied as precedent to other power pools or multi-utility systems comprised of unaffiliated entities who coordinate only to achieve certain operational efficiencies. *See* Opinion No. 234-A, 32 FERC at 61,949 (distinguishing *Southern Company Services, Inc.*, 20 FERC (CCH) ¶ 61,332 (September 22, 1982), because that case did not involve commonly owned affiliates in an integrated system). Nor can the Commission's allocation in this case be used as a template for all other commonly owned utility systems, since, as FERC emphasized, its decision hinged not

merely upon the fact of common ownership, but also upon a variety of other factors, including the historical pattern of decisionmaking and rough equalization of generation costs within the Entergy system. 32 FERC at 61,956. In short, the Court's review of this case would not resolve legal issues of broad applicability.

Petitioners' unclear and undocumented assertion (Petition at 19) regarding the purported "strong national interest" in addressing issues related to nuclear power cost allocation is similarly without merit. Petitioners fail to identify any planned or operating nuclear units that are directly analogous to the Entergy nuclear plants. Again, the Commission's allocation is a highly fact-specific determination which raises no important legal or policy issues warranting review.

Petitioners' attempts to manufacture an issue deserving of this Court's attention cannot mask their real interest—escaping the Grand Gulf cost allocation which FERC assigned to them.[14] Petitioners' arguments fall wholly outside the scope of the *Mississippi Industries* dissent and the court's remand order.[15] Moreover, as FERC found, the

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[14] Petitioners, as well as other dissatisfied parties, have tried before to evade FERC-prescribed Grand Gulf cost responsibility. *See Mississippi Power & Light, supra*; *Middle South Energy, Inc. v. Arkansas Public Service Comm'n*, 772 F.2d 404 (8th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986). FERC's allocation has stood as a federal bulwark against such parochial interests, consistent with its role as expressed by Justice Scalia in *Mississippi Power & Light*, 108 S. Ct. at 2442-43.

[15] Judge Bork's dissent concerned only: (1) the adequacy of FERC's explanation, in light of its findings of System integration, of its criteria for identifying undue discrimination and why its remedy corrects such discrimination; and (2) the rationality of FERC's decision to allocate all nuclear capacity costs, rather than the costs of only Grand Gulf and Waterford 3 or the costs of all nuclear and coal units.

As emphasized above, Petitioners' proffered remedy is incompatible with the fact of System integration which Judge Bork

alternative which Petitioners now endorse, ALJ Head's allocation, does not comport with the standard which they advocated or cure the defect which they argued to the court of appeals existed in FERC's allocation. App. 43a-44a. It would, however, assess MP&L substantially less Grand Gulf cost responsibility than does FERC's remedy. Petitioners' lack of a principled basis for opposing FERC's allocation reveals a simple parochial dissatisfaction with FERC's decision. Under these circumstances, review by this Court would not only serve no useful purpose, it would seriously interfere with the effective exercise of FERC's responsibility to allocate costs among affiliates in a tightly integrated interstate electric system.

II. GRANT OF CERTIORARI IN THIS CASE WOULD BE CONTRARY TO PRINCIPLES OF JUDICIAL REVIEW AND ADMINISTRATIVE DELEGATION.

Petitioners maintain that the *City of New Orleans* court gave "total deference to an administrative ratemaking decision" and "abdicated" its judicial review function. Petition at 15, 16. This argument mischaracterizes the court's decision and distorts the applicable standard of judicial review. Petitioners seem to suggest that the court of appeals—and presumably this Court as well—must undertake *de novo* review of the evidentiary basis of an agency decision, reach its independent conclusions regarding the "total effect" of FERC's allocation, and substitute its judgment for that of the agency. In effect, they seek

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affirmed. Moreover, Petitioners did not support the alternative allocations suggested in the dissent. Indeed, Petitioners *opposed* a suggestion, offered by the Louisiana Consumers on remand, that FERC consider giving each operating company a proportionate entitlement to energy from each of the System's nuclear units. That proposal, which would have made little difference in overall cost responsibilities, would have eradicated any basis for Petitioners' "lack of benefit" argument.

to transform the reviewing court into a ratemaking tribunal charged with the duty of determining what constitutes a nondiscriminatory rate in a particular case. However, as this Court has recognized, the scope of judicial review is more limited:

> First, [the reviewing court] must determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. Second, the court must examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence. Third, the court must determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable. *The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.*

Permian Basin Area Rate Cases, 390 U.S. 747, 791-792 (1968) (emphasis added).

The court below amply fulfilled its judicial review responsibilities. In *Mississippi Industries*, the court found that FERC had acted within its jurisdiction and had based its findings on substantial evidence. Concerned, however, that the Commission had not adequately explained the basis for the particular remedy which it adopted, the court directed a limited remand to FERC for a further explanation of the standard it had applied and, given the Commission's findings, why two other alternatives would not better remedy the undisputed discrimination. The court in *City of New Orleans* systematically

evaluated the Commission's responses to the issues raised in Judge Bork's dissent and found that they reflected reasoned judgment consistent with the evidence.

Petitioners apparently complain that, after the remand for consideration of the issues raised by Judge Bork's dissent, the court failed to explore their position a second time, although their argument is unrelated to those issues. The court properly declined to address these arguments in favor of ALJ Head's allocation, in view of *Mississippi Industries*' prior rejection of that alternative after a searching review. It did, however, indirectly reaffirm the invalidity of the "Grand Gulf-only" approach by upholding the Commission's remand finding that "a proportionate allocation of nuclear investment costs was justified by the indirect benefits provided by the nuclear units to all of the companies." App. 9a.

The concept of administrative delegation is the handmaiden of the principle of limited judicial review. FERC is a "specialized agency created by Congress to deal with complex problems." *Ohio Power Co. v. FERC*, 668 F.2d 880, 886 (6th Cir. 1982). Administrative ratemaking demands that the agency make expert "pragmatic adjustments," informed by evidence and guided by statutory and case law standards. *See FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). Petitioners' invitation to this Court to usurp the agency's ratemaking function should be rejected, and the petition for a writ of certiorari in this case should be denied.

CONCLUSION

The Petitioners base their request for certiorari on a conclusory assertion that is inconsistent with the Commission's findings of fact, which were affirmed by the court of appeals. No important issue of federal law is presented by this case. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

Pursuant to Rule 29.1 of the United States Supreme Court Rules, the following list sets forth all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of Occidental Chemical Corporation and Georgia Gulf Corporation:

Occidental Chemical Corporation

Canadian Occidental Petroleum Ltd.—Canada (Dominion)
Hooker Chemical Investment Co.—California
International Ore & Fertilizer Belgium, S.A.—Belgium
International Ore & Fertilizer S.p.A.—Italy
Occidental Chemical Holding Corporation—California
Occidental Minerals (Philippines), Inc.—Philippines
Occidental Petroleum Corporation—Delaware
Occidental Petroleum Investment Co.—California
Occidental Quimica Do Brasil Ltda.—Brazil
Oxy CH Corporation—California
Oxy Chemical Corporation—California
Oxy Metal Industries (France) S.A.—France
Petway Products Distributors, Inc.—New York
Sumitomo Durez Co., Ltd.—Japan
Trans-Jeff Chemical Corporation—Delaware
Vinimarket-Administracao, Participacao e Corretora de Seguros S.A.—Brazil
Vinor Vinilicos do Nordeste Ltda. ("Vinor")—Brazil
Vulcan Material Plastico S.A. ("Vulcan")—Brazil
Occidental Chemical Asia, Limited—Japan
Hooker Chemical (Puerto Rico), Inc.—Puerto Rico
Hooker Energy Corporation—New York
Hooker Niagara Office Corporation—New York
JWM Gas Supplier Corporation—California
Occidental Chemical Europe, S.A.—Belgium
Sumidurez Singapore Pte. Ltd.—Singapore
Occidental Chemical Corp. (Australia) Pty. Ltd.—New South Wales, Australia
Oxy-Alkali Cogeneration Corporation—Delaware

OxyChem (Cyprus) Limited—Cyprus
OXYLINK, Inc.—Delaware
OXYTECH Systems, Inc.—Delaware
Oxytech do Brasil Industria e Commercio Ltda.—Brazil
Carbocloro S.A. Industrias Quimicas—Brazil
Oxypar Industrias Quimicas S.A.—Brazil
Malharia Industrial do Nordeste S.A.—Brazil
Vulcan Tubos e Conexoes S.A.—Brazil
HCPC International, Inc.—California
International Ore & Fertilizer Ltd.—Liberia
OMF Holdings (Liberia) Ltd.—Liberia
Industrias Oxy S.A. de C.V.—Mexico
Oxy VCM Corporation—Delaware
Oxy Petrochemicals, Inc.—Delaware
Interore Corporation of Saudi Arabia—Liberia
Occidental Chemical Processes Corporation—Liberia
Primex, Ltd.—Barbados, West Indies
PDG Chemical, Inc.—Delaware
Diamond Shamrock Chemicals Company Pte. Limited—Australia
Thai Diamond Shamrock—Thailand
Thai Occidental Chemical Ltd.—Thailand
Tororo Industrial Chemicals and Fertilizers Limited—Uganda

Georgia Gulf Corporation

None